Automotive Plastic Technologies, Inc. d/b/a Nashville Plastic Products *and* Aluminum, Brick and Glass Workers International Union, AFL–CIO, CLC. Cases 26–CA–14548 and 26–CA–14727

November 26, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On June 30, 1993, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

1. We agree with the judge that the Respondent violated Section 8(a)(1) by requesting employees who were ''bothered'' or ''harassed'' by other employees advocating the Union to report it to management. Such a request could be interpreted by employees to include lawful attempts by union supporters to persuade employees to sign union cards. It would thus tend to restrain union proponents from attempting to persuade other employees for fear of being reported to management. See *Arcata Graphics*, 304 NLRB 541 (1991), and cases cited therein.

2. The judge found that by prohibiting union solicitation, or the distribution of union literature on company property during nonworktime in nonwork areas, and by confiscating union literature, the Respondent violated Section 8(a)(1). Among the incidents which the judge found to be violations were several instances in August 1991, shortly before the election, when the Respondent told employees who were handbilling in outside areas of the premises that they were not allowed on the property unless they were scheduled to work. The Respondent excepts, contending that enforcement of its rule limiting the distribution of literature on the Respondent's property by off-duty employees was lawful. Relying on *Lechmere*,[1] which held that Section 7 does not require permitting nonemployee union organizers to come onto private property except in cases involving inaccessibility of employees, the Respondent argues that the access rights of off-duty employees equate to those of nonemployees. We disagree with the Respondent. For the following reasons, we find that under the circumstances presented here, the Respondent was not privileged to rely upon its alleged rule limiting the access rights of off-duty employees.

First, although the Respondent contends that it maintained a rule prohibiting off-duty employees from being on the premises on days when they were not scheduled to work, the Respondent has presented no evidence of the existence or dissemination of such a rule prior to the union handbilling. The evidence suggests that the employees first heard about the rule at the time the Respondent sought to invoke it.[2] Although the Respondent apparently told the union business agent that the prohibition was in the rules and regulations, it has not cited for us any handbook provision which denies off-duty employees access to the parking lot and other outside areas of the property.[3] Nor has the Respondent demonstrated that the restrictions on access by off-duty employees were required by legitimate business considerations, such as safety. Thus, insofar as the record shows, the rule the Respondent relies on was promulgated in response to the employees' union handbilling. Under these circumstances, we find that the rule constituted a new policy established for the purpose of interfering with and restraining employees in the exercise of their Section 7 rights.[4] We find that the Respondent is not entitled to rely on such an invalid rule to privilege its restrictions on the Section 7 activities of off-duty employees.

[1] *Lechmere v. NLRB*, 112 S.Ct. 841 (1992).

[2] Thus, when Plant Manager Thom Bee told employee William Ferguson that he was breaking company rules being on company grounds when it was not his day to work, Ferguson replied, ''No, those are your rules.'' Employee John Bendele testified without contradiction that Bee told him and Ferguson that they were not allowed on company property when it was not their scheduled day and that Bee advised Union Business Agent Revel Black that that was in the rules and regulations.

[3] By contrast, the company handbook contains a provision requiring that visitors *in the plant*, including off-duty employees, register with the receptionist, as well as rules prohibiting solicitation distribution by employees during working time and by nonemployees at any time on company property.

[4] See *American Commercial Bank*, 226 NLRB 1130, 1131 (1976).

Second, even under the *Lechmere* principles relied on by the Respondent, it is well established that an employer may not apply its access rule in a discriminatory manner.[5] Here, the judge found, and we agree, that the Respondent expelled from its property off-duty employees who were distributing union handbills while allowing another off-duty employee who was distributing antiunion literature nearby to remain on the premises and continue to do so. Such disparate enforcement precludes the Respondent's reliance on the rule as a valid defense to its conduct.

Third, we reject the Respondent's argument that off-duty employees should be viewed in the same light as nonemployee union organizers for purposes of defining their right of access to the Respondent's property. Although in *GTE Lenkurt*,[6] the Board considered the status of an off-duty employee to be ''more nearly analogous to that of a nonemployee,'' in *Tri-County Medical Center*,[7] the Board narrowly construed *GTE Lenkurt* ''to prevent undue interference with the rights of employees under Section 7 of the Act freely to communicate their interest in union activity to those who work on different shifts.'' In *Tri-County*, the Board held that a no-access rule concerning off-duty employees is valid only if it:

> (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.[8]

In subsequent cases, the Board, with court approval, has adhered to this view.[9] Under the *Tri-County* standard, it is clear that the Respondent's rule is invalid and, therefore, the Respondent is not privileged to rely on it.

We reject the Respondent's argument that *Lechmere* applies to off-duty employees. *Lechmere* itself emphasized the critical distinction between employees and nonemployees as established in *NLRB v. Babcock & Wilcox*,[10] and, *a fortiori*, the rule enunciated in *Lechmere* does not apply to employees. By virtue of the continuing employment relationship, an off-duty employee, even if not scheduled to work on the day he seeks access to the premises, remains an employee of the employer. Unlike the nonemployee union organizer whose status as a trespasser invokes the employer's property right to restrict access,[11] an off-duty employee is a ''stranger'' neither to the property nor to the employees working there.

Furthermore, an off-duty employee seeking access to his employer's property to distribute union handbills, unlike a nonemployee union organizer, falls within the scope of Supreme Court decisions protecting workplace organizing activities. Thus, in *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978), the Court stated that ''the right of employees to self-organize and bargain collectively established by Section 7 . . . necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.'' And in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978), the Court upheld the Board's view that the workplace ''is a particularly appropriate place for the distribution of Section 7 material, because it 'is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life.''' (Quoting *Gale Products*, 142 NLRB 1246, 1249 (1963).)

In sum, if analogies are to be drawn, we find that the off-duty employees in this case who sought access to the Respondent's premises for organizational purposes on days when they were not scheduled to work most closely resemble the employees in the *Le Tourneau* case, whose right to distribute union literature on the outside areas of the employer's premises on their own time was upheld by the Supreme Court.[12] Accordingly, for all these reasons, we find no merit in the Respondent's contentions and affirm the judge's finding that the Respondent violated Section 8(a)(1) by refusing to allow off-duty employees who were distributing union literature to remain on its property.[13]

3. In adopting the judge's finding that the Respondent violated Section 8(a)(1) by its surveillance of employee union activity, we note that the Respondent's action went far beyond the mere lawful observation of

[5] *Davis Supermarkets*, 306 NLRB 426, 426–427 (1992), enfd. 144 LRRM 2057 (D.C. Cir. 1993).

[6] 204 NLRB 921 (1973).

[7] 222 NLRB 1089 (1976).

[8] Id.

[9] E.g., *St. Luke's Hospital*, 300 NLRB 836 (1990); *Ohio Masonic Home*, 290 NLRB 1011 (1988), enfd. 892 F.2d 449 (6th Cir. 1989); *Clark Manor Nursing Home Corp.*, 254 NLRB 455 (1981), enfd. in relevant part 671 F.2d 657 (1st Cir. 1982); *Presbyterian Medical Center*, 227 NLRB 904 (1977), enfd. 586 F.2d 165 (10th Cir. 1978).

[10] 351 U.S. 105 (1956).

[11] See *Southern Services*, 300 NLRB 1154, 1155 (1990), enfd. 954 F.2d 700 (11th Cir. 1992).

[12] *NLRB v. Le Tourneau Co. of Georgia*, 324 U.S. 793 (1945) (the companion case to *Republic Aviation Corp. v. NLRB*, enfg. 54 NLRB 1253 (1944)). In *Le Tourneau*, one of the unlawfully disciplined employees distributed union handbills in the company parking lot after he ''finished his day's work,'' 54 NLRB at 1257, and thus it appears he was an off-duty employee at that time.

[13] In light of the findings that the no-access rule was discriminatorily motivated and disparately applied, Member Raudabaugh finds it unnecessary to pass on the issue of whether, apart from these considerations, *Lechmere* applies to the activities of off-duty employees.

open union activity. The surveillance was unlawful because it involved continuous scrutiny over a substantial period of time, and it was accompanied by the Respondent's ordering off-duty employees engaged in handbilling to leave the premises and confiscating union literature which an employee was lawfully distributing.[14]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Automotive Plastic Technologies, Inc. d/b/a Nashville Plastic Products, Nashville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[14] See *Impact Industries*, 285 NLRB 5 fn. 2 (1987), remanded on other grounds 847 F.2d 379 (7th Cir. 1988); *Hoschton Garment Co.*, 279 NLRB 565, 566 (1986).

Jane Vandeventer, Esq., for the General Counsel.
Donald T. Carmody, Esq. (Carmody & Collazo), of New York, New York, for the Respondent.
Revel Black, of Nashville, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. These cases were tried in Nashville, Tennessee, on June 9 and 10, 1992, on a consolidated complaint issued on January 10, 1992. The charges were filed by the Union, Aluminum, Brick and Glass Workers International Union, AFL–CIO, CLC on June 25, 1991, in Case 26–CA–14548 as amended on July 2, and 25, 1991, and in Case 26–CA–14727 on October 1, 1991, as amended on January 7, 1992. These cases were consolidated with a representation case in Case 26–RC–7388. Upon the withdrawal of the objections in the representation case, the case was severed from the two prior cases on June 3, 1992.

The consolidated complaint alleges in substance that the Respondent, Automotive Plastic Technologies, Inc., violated Section 8(a)(1) of the National Labor Relations Act (the Act) by repeatedly threatening employees because of the Union, by interrogating employees about the Union, by engaging in surveillance of the employees' union activities, by prohibiting them from talking about the Union and from handbilling for the Union, by announcing an invalid no-solicitation rules and by threats that bargaining would start from scratch or zero if the Union were selected. According to the complaint, the settlement agreement approved on July 26, 1991, was properly set aside as a result of these violations of the Act.

The Respondent filed an answer, admitting the jurisdictional and supervisory aspects of the complaint and denying the commission of any of the violations alleged in the complaint.

On the entire record[1] in this case and from my observation of the demeanor of the witnesses and considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Automotive Plastic Technologies, Inc., d/b/a Nashville Plastic Products, is a corporation located in Nashville, Tennessee, where it is engaged in the manufacture and sale of automotive parts. With sales and shipments of goods valued in excess of $50,000 from its facility to points outside the State of Tennessee, the Respondent is admittedly engaged in commerce and an employer within the meaning of Section 2(2), (6), and (7) of the Act.

The Union, Aluminum, Brick and Glass Workers International Union, AFL–CIO, CLC, is admittedly a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Background*

The production and maintenance employees at Respondent's plant in Nashville, Tennessee, began an union organizational campaign in early 1991. A petition was filed on July 8, 1991, pursuant to a Stipulated Election Agreement. An election was held on August 27, and 28, 1991, among 310 eligible voters. On September 4, 1991, the Union filed objections to conduct affecting the results of the election. By order of March 2, 1992, certain objections in Case 26–RC–7388 were ordered consolidated with the unfair labor practice complaint in Case 26–CA–14727. However, by order of June 3, 1992, and upon a request to withdraw the objections, Case 26–RC–7588 was severed from the unfair labor practice complaint. The settlement agreement approved on July 26, 1991, in Case 26–CA–14548 was set aside by order of January 10, 1992.

During its opposition to the employees' union drive, the Respondent engaged in conduct which went beyond permissible bounds in numerous respects.

B. *The Round Table Minutes*

As alleged in the complaint, the Respondent distributed to the employees ''Round Table'' minutes, including those dated June 21, 1991. The minutes were also posted for approximately 1 month on the employee bulletin boards. The minutes reflect discussions between management and employees about working conditions or problems encountered by employees (G.C. Exh. 2, Tr. 31–34, 149–51). Typically, 8 to 10 employees were selected by management to attend the meetings with Plant Manager Thom Bee and another supervisor. The meetings were held pursuant to the Company's employee handbook which provides as follows (G.C. Exh. 24).

C. *Plant Manager Roundtable Meetings*

Once each month the Plant Manager has a ''Roundtable Meeting'' with employees representing each major

[1] The General Counsel's motion to strike late-submitted exhibits is granted.

> department. At these informal sessions, refreshments are served while the state of business is addressed. Present news as well as upcoming events are discussed and are followed by a question and answer period.
>
> Bulletins following these meetings are distributed to all employees.

The June 21, 1991 minutes of the roundtable discussion deal with the employees' union campaign, advising the employees of the advantages and disadvantages of union affiliation. In the first paragraph the document admonishes the employees as follows:

> There is some talk of voting in a union in this plant. This topic of conversation is to be covered somewhere other than the plant floor. Those not heeding this warning will be disciplined accordingly. Employees bothered by other employees or outsiders advocating a union need only see your supervisor or anyone in management and we will see that it stops.

The minutes also state in connection with an explanation of the significance of a union authorization card: ''If you are being harassed, feel free to bring it to you[r] supervisor's attention.''

According to the General Counsel, this language constituted a prohibition on employees' workplace conversations designed to single out discussions about the Union as well as an unlawful request to employees to report on the union activity of their fellow employees.

The record shows that the Employer warned employees that the topic of ''voting in a union'' was prohibited on the plant floor and that employees who violated this prohibition would be disciplined. Yet employees were not prohibited or disciplined for conversing in the plant about topics other than the Union, such as sports or the weather or about personal matters (Tr. 214). Indeed, employees freely talked about such topics. Respondent's published threats of discipline for talking about the Union in the workplace constitute an interference with the employees' Section 7 rights and clearly violated Section 8(a)(1) of the Act.

Also unlawful, according to the General Counsel, was the Respondent's request directed at the employees to report to management the harassment by union organizers. The minutes contain two such references, ''[e]mployees being bothered by other employees or outsiders advocating a union need only see [their] supervisor . . . [who] will see that it stops'' and in referring to solicitations for signatures on union cards, if ''you are being harassed, feel free to bring it to your supervisor's attention.'' Although the language is couched more as an invitation to report union activity rather than a demand, the message would restrain and coerce a union proponent from advocating a union among the employees and from soliciting fellow employees to sign a union card. I accordingly find that the Respondent thereby violated Section 8(a)(1) of the Act. *Bank of St. Louis*, 191 NLRB 669, 673 (1971).

D. *The No-Solicitation Rule*

The Respondent's employee handbook contains a provision entitled, ''Controlled Solicitation and Distribution'' (G.C. Exh. 2, p. 4). This rule prohibits any form of solicitation during ''working time,'' which is defined as ''that period during the shift other than meal periods, rest periods, or other times when the employee is not engaged in performance of work.'' The prohibition also includes the ''[d]istribution or solicitation by non-employees anywhere on company property at any time.'' While the rule is presumptively valid, Respondent has verbally prohibited union solicitation under the following circumstances.

On June 20, 1991, Plant Manager Thom Bee called John Bendele into his office. Bendele had worked as a mold technician for 5 years and was one of the most active union supporters who attended union meetings, distributed union literature to other employees, and tried to organize them for the Union. Bee told Bendele in the presence of Ben Carter, assistant plant manager, that he was ''getting word that you're soliciting for the Union on the shop floor.'' Bee continued as follows, ''if I catch anybody out there on the shop floor soliciting for the union or anything else, they will be discharged immediately . . . don't do it on company property or on the shop floor or you will be discharged immediately'' (Tr. 155–156).

Bee, who testified in this case, did not deny this conversation. It is accordingly clear that the Respondent prohibited union soliciting on company property even though it tolerated talking on company property about other matters such as sports or the weather (Tr. 213–214). The Respondent also threatened employees with discharge for engaging in union activity.

A few days later, Bee again interdicted Bendele's union soliciting activity when Bendele complained about a fellow employee. Familiar with the prohibition contained in the employee handbook against harassment by one employee against another, Bendele reported to management an incident which occurred on June 23, 1991, in the breakroom. On that day, Jeff Atkins had scolded Bendele who had taken his break in the breakroom. Raising his voice, Atkins had said that the employees did not need a union, that Bendele should not speak on behalf of these employees, that he was a troublemaker who would ruin the jobs for everybody (Tr. 159). Responding to Bendele's complaint about this incident, Bee initially agreed that Atkins should not have harassed another employee, but Bee continued and said that Bendele should not harass anybody about the Union or go to their homes to talk about the Union or risk disciplinary action (Tr. 160–161). Respondent thereby announced again a restriction on union solicitation.

At about the same time, June 23, when Bendele was distributing union literature in the shipping department near the timeclock, Dale Strong, supervisor in the shipping department, asked Bendele whether he had received permission. Bendele said, ''no.'' Strong then confiscated the leaflets and told Bendele to stop soliciting even though the activity had taken place in a nonworking area and prior to Bendele's morning shift (Tr. 156–158).

Respondent's conduct in prohibiting union soliciting by its employees was clearly unlawful, because the prohibition against soliciting was discriminatorily applied only to union solicitation. *Our Way, Inc.*, 268 NLRB 394, 395 (1983).

E. *Prohibition on Handbilling*

The record is replete with incidents of restrictions on handbilling for the Union. When on June 23, 1991, employee

Bendele handed out union literature near the timeclock in the shipping department, Supervisor Strong prohibited his activity even though Bendele was in a nonworking area and had not yet started his shift. Bendele testified as follows about the incident (Tr. 157):

> I was talking to Tracey Jefferson and Dale Strong walked up to me and asked me, he said, ''Has anybody told you not to be handing those out?'' And I said, ''No sir.'' And he snatched them out of my hand and said, ''Consider You have been now.'' I said, ''That's my personal property and I'm on my time. That's mine. I'm not on company time.'' He said, ''I've been instructed to take these away and stop all soliciting.'' I said, ''All right.''

On August 19, 1991, Plant Manager Thom Bee approached three employees, John Bendele, Patrick Ferguson, and Shawn Pogues as they distributed union literature near the employees' plant entrance. According to Pogue, Bee asked the employees what shift they worked. After they identified their respective shifts, Bee asked them to leave and escorted them off the property out the gate. Again, the employees were on their own time when Bee ordered the activity stopped (Tr. 52).

A similar incident occurred on August 28, 1991, as employee Jay Simpson was distributing union literature outside the glass door of the employee entrance to the molding department. On the other side of the door Supervisor Phyllis Vanetta distributed antiunion literature. Employee Eddie Bell, who was not on dutys stood close by and also distributed antiunion handbills. Plant Manager Bee came out of his office and asked Vanetta if Simpson was working during this shift. Vanetta did not know. Simpson informed Bee that this was her day off. Bee promptly told her to leave the property, but he did not prohibit the handbilling against the Union by Bell or the supervisor. Simpson protested and referred to the Board's notice posted nearby on the bulletin board. Bee said, ''[e]ither you leave or I'll have you escorted off'' (Tr. 211).

Approximately August 12, 1991, three employees, Sherrie Shockley, Shawn Pogue, and Jay Simpson, were distributing union literature on a patio outside the front of the plant. This was the same area where employee Eddie Bell had handed out antiunion literature in the presence of Supervisor Ray Turner a few days earlier. Yet on this day, Personnel Director Jimmy Tullis and Bee appeared and ordered the three employees off company property and to the street (Tr. 133–155).

Some time later, 3 or 4 days before the election, Sherrie Shockley and Shirley Mayberry were passing out union literature near the front gate of the building on the patio. Supervisor Scott Smith approached the two employees and instructed them to leave the area and ''go back to the street with that literature'' (Tr. 132).

Bee also ordered employees John Bendele and Patrick Ferguson off company property on August 28, 1991, while they were handbilling on behalf of the Union on the parking lot (Tr. 90–91).

As a result of those incidents it is clear that the Respondent tolerated the antiunion handbilling on company property but prohibited repeatedly the handbilling on behalf of the Union on company property during the employees' own time. Respondent's conduct in this regard clearly violated Section 8(a)(1) of the Act. *Our Way, Inc.*, supra.

F. *Surveillance of Union Activity*

According to the complaint, more than a dozen supervisors or agents engaged in the surveillance of the employees union activities in violation of the Act.[2] The record is replete with the testimony of nine employees that the handbilling activity on behalf of the Union was observed by a group of supervisors from inside and outside the plant doors. For example, Shawn Pogue, an employee, testified that between July and August she distributed union handbills on at least 25 occasions for approximately 30 to 40 minutes prior to the beginning of her shift (Tr. 34–35). And on each occasion she saw supervisors around the employee entrance, the patio area and the reception area, for the entire period of time while she engaged in the union activity. She usually saw John Jackson or Lee Brantley and Scott Smith in front of the employee entrance, and Gene Steakly on the patio (Tr. 46).

Employee William Ferguson passed out union literature about 10 times in the parking lot before or after his shift. At those times, Ferguson saw Supervisors Jim McNeal, Robert Payne, Al Frillman, Ben Carter, Gene Steakley, and Thom Bee (Tr. 87–88). They would usually be there for 30 minutes. Whenever Ferguson engaged in these union activities supervisors were watching him (Tr. 89–90).

Carla Dalton, an operator in the molding department, testified that she participated in the majority of handbilling efforts, initially once a week and after August 5, 1991, twice a week. She would spend approximately 30 minutes before her morning shift at the entrance to the parking lot. During the last 2 weeks before the election she always saw members of management and supervisors watching their activity. She recalls seeing Tom Reading, John Jackson, Lee Brantley, Ben Carter, and Thom Bee (Tr. 116–117).

Employee Clarence Johnson similarly testified that he engaged in handbilling on behalf of the Union for about 1 hour on several days prior to the election. He saw supervisors and members of management, Thom Bee, John Jackson, Ben Carter, Jimmy Tullis, as they observed the handbilling (Tr. 123–126).

John Bendele, one of the most active union supporters among the employees, testified that he handbilled in July and August about 20 times for approximately 40 to 60 minutes depending how early he would arrive prior to his working time. He saw Tom Reading, Mike Long, Lee Brantley, Thom Bee, Ben Carter, and Jimmy Tullis, as they watched him ''hand flyers to people as they'd drive by in the cars'' (Tr. 164). On at least one occasion Bee ordered Bendele off company property saying ''you've got to handbill off company property'' (Tr. 165).

Sherrie Shockley, an employee at Nashville Plastic during the union campaign, testified about her handbilling activity and recalled that on two occasions before the election she was ordered off company property after supervisors observed her handbilling (Tr. 131–133). Employee Carolyn Burk recalled in her testimony that she handbilled on about a half a dozen times. On the day of the election as she handbilled for about 1 hour, she saw Thom Bee, Gene Steakley, Al

[2] The complaint was amended to surveillance of union activity (Tr. 10).

Frillman, and Robert Payne looking at them for the entire time (Tr. 181–182).

Shirley Mayberry, employed for almost 6 years, and Jay Simpson, a material handler, similarly testified that their handbilling activity was observed by management (Tr. 191, 208–209). Simpson named the same supervisors as the prior witnesses and stated that they were watching every time he was out there for as long as he was handbilling (Tr. 208–209). He also related the incident when Bee ordered him off company property even though he referred to the posted Board notice stating that he had certain rights (Tr. 211).

The Respondent did not dispute the testimony of these employee witnesses. Bee admitted that he knew most of the employees who engaged in the handbilling activity, because they were usually the same employees. He also admitted that other supervisors observed the activity of the employees (Tr. 242). Stating that he ''really wasn't that concerned with the handbilling,'' he testified what he ''mainly was concerned about were the safety aspects of what was going on'' (Tr. 242). He referred to traffic congestion or the possibility of an altercation among employees, and possible vandalism (Tr. 242–243).

Bee had to concede, however, that none of the incidents of vandalism or altercations which he cited had any relationship to the union activity of the employees. Furthermore, none of the employee witnesses were aware of any traffic problems caused by their handbilling activity. None of them had observed any violence. The police had been called by management on at least one occasion, but were apparently not needed (Tr. 72, 101, 110). I do not credit Bee's professed reasons for the Respondent's surveillance.

The record shows a concentrated effort by the Respondent to assemble members of management in visible areas of the plant for the sole purpose of watching the employees as they on their own time distributed union literature to fellow employees. In that connection, the Respondent prohibited this activity on company property, on one occasion seized the union literature and generally discouraged the practice on behalf of the Union while tolerating the distribution of antiunion literature. Although it is generally accepted that management cannot be expected to close its eyes to the public display of union activities by its employees, as for example the open distribution of union literature on the parking lot, Respondent's conduct here was intended to have an obvious and calculated restraining effect on the employees. I accordingly find that the Respondent violated Section 8(a)(1) of the Act.

G. *Threats*

In addition to the threats made to employees on June 20 and June 21, 1991, that soliciting for the Union on the shop floor would result in their discipline or discharge, as stated above, the complaint contains several allegations that the Respondent threatened employees with certain adverse consequences for engaging in union activities.

The record shows that on several occasions representatives of Respondent's management in meetings with their employees threatened them about the consequences of a union. Shawn Pogue, for example, testified that she attended six meetings with Supervisors Robert Payne, Lee Brantley, and John Jackson. In one meeting, with the employees in the assembly department, Payne said that ''if the union was voted in that wages and benefits . . . would start from zero'' (Tr. 53–54). According to Pogue's uncontradicted testimony, Payne also threatened her individually with discharge if he caught her passing any union literature during working hours (Tr. 55).

Personnel Director Jimmy Tullis at a meeting with the entire shift told the employees approximately 4 weeks before the election ''that if the union came in that we could lose everything and that we would have to start from scratch'' (Tr. 93). Employee Ferguson's testimony in this regard was not contradicted.

At another meeting about 1 week before the election, Tullis spoke to employees in the assembly, shippings and receiving department (Tr. 197–198, 200). Employee Shirley Mayberry recalled him saying this (Tr. 192): ''He told us if we voted the union in that all our raises and benefits would be frozen for a year.''

Sherrie Shockley testified that she attended four meetings where supervisors spoke about the Union. At the second meeting held in the middle of August in the personnel department with employees from the shift assembly department, Jim McNeal, a supervisors said ''that the company didn't feel like we needed a union and that if . . . the union was voted in, all wages and benefits would be frozen . . . that if a union was voted, it possibly could cost us our jobs because he said that Chrysler was looking for a vendor closer to them and Chrysler was located in St. Louis'' (Tr. 137). McNeal also spoke at the third meeting which Shockley attended where he said that benefits and insurance would be frozen during negotiations (Tr. 138).

Employee Jay Simpson attended about three meetings where McNeal said as follows (Tr. 215–216):

> He told us how we didn't need a union and then if we voted the union in that all of our benefits would be frozen, that all of our progressive raises—you know, it takes 15 months to top out on your job raises. He said all of them would be frozen until we negotiated a contract. He also said—I asked him a question about our dental insurance. It was just a month before I was there a year and eligible for dental insurance. I asked him if we voted the union in, you know, in the next couple of weeks if I'd be eligible for my dental insurance in September like I'm supposed to be, and I was told no, that everything would be frozen.

Simpson recalled that McNeal said at the August 13 meeting ''benefits would be frozen and all pay increases would be frozen until a contract was negotiated . . . that could take up to a year'' (Tr. 228).

Employee John Bendele, who had attended six or eight employee meeting testified about a meeting held 3 days before the election with the molding and maintenance department. Thom Bee referred to union negotiations at another firm stating that their pay was frozen for a year and that the Respondent's employees would also have their pay frozen until a contract is negotiated (Tr. 168–169).

Here, it is clear that the Respondent did not make factual statements concerning possible adverse results of unionization, rather the Respondent systematically emphasized that wages or benefits would be frozen, and that negotiations would start from scratch. Under these circumstances and in

a context of other violations of the Act, it is clear that these statements were coercive and had the tendency to interfere with the employees' Section 7 rights. I accordingly find that the Respondent's threats violated Section 8(a)(1) of the Act as alleged in the complaint.

H. *Interrogation*

The complaint alleges multiple incidents of coercive interrogations of employees by various supervisors.

In early August 1991, Supervisor Robert Payne called Shawn Pogue into his office. Pogue recalled Payne saying as follows (Tr. 55): ''He said that he had heard rumors and had witnesses that said that I was passing out union literature during working time.'' Pogue replied that if Payne wanted to talk about work or the performance of her job, he should speak, but if he wanted to say something about her union activities then she wanted a witness present. Payne said that if he caught her passing out union literature during working hours he would get rid of her.

Although Payne's remarks were more in the nature of an accusatory question than an outright interrogation, it was clear that he expected a reply about Pogue's union activity. That the surrounding circumstances were coercive is clear. I accordingly find that the episode amounted to an unlawful interrogation in violation of Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176 (1984).

On several occasions, supervisors went from employee to employee offering them antiunion T-shirts. Supervisor Payne went through the assembly department with 40 employees with shirts inscribed ''Vote NO,'' spoke to each employee and offered them a shirt and Supervisor Long contacted the employees in the molding department inquiring whether they wanted a shirt. Some employees accepted a shirt and others refused them (Tr. 55–60, 166–167). The testimony of the two employees, Pogue and Bendele, who observed this conduct was not refuted.

Respondent's actions, offering antiunion items to the employees, puts the employees on the spot, forcing them to reveal or to hide their union sympathy. It is accordingly unlawful under Section 8(a)(1) of the Act. *Great Western Coca Cola Bottling Co*., 256 NLRB 520 (1981).

I. *Procedural Issues*

The Respondent presented two procedural issues as a defense: first, that the case should have been reopened for the receipt of additional evidence and second, that the Regional Director's decision to vacate the settlement agreement constituted a denial of due process.

Motion to Reopen. Respondent's motion to reopen the record was made in its brief submitted on August 3, 1992. The Respondent argues that it would be prejudiced by a decision which did not consider the testimony of George Curry and two unnamed witnesses. The records however, shows that the Respondent has failed to use due diligence in proffering the testimony of these witnesses. None of them were present at the hearing. Despite a recess, the witnesses failed to appear (Tr. 253–277). According to Respondent's counsel's representation, the witnesses were subpoenaed for the first day of the hearing. They did not appear for the first or the second day (Tr. 254). The case was adjourned for several hours for counsel to contact the witnesses (Tr. 265). Counsel's effort in that regard was unsuccessful (Tr. 266). Respondent's counsel refused to make an offer of proof and requested an adjournment of 3 weeks which was denied (Tr. 275). Respondent was unable and did not show that any of the witnesses had been served properly by subpoena. Respondent's counsel was advised as follows (Tr. 276), ''you may make a motion to reopen the record and your motion to reopen the record may be accompanied by your Subpoenas and any other documentary evidence that you may wish to attach to it.'' Nevertheless even now, the motion to reopen is not supported by any documentary evidence to show that the Respondent used due diligence in serving the subpoenas. In short, the Respondent has not shown that it was prejudiced by my ruling in the record, the Respondent has failed to show the relevancy of the additional evidence sought or why it was not presented with the exercise of due diligence. Respondent's motion to reopen the record is therefore denied.

J. *The Settlement*

The parties entered into a settlement agreement on July 25, 1991. The record shows that despite its promise to discontinue its unlawful conduct, i.e., not to prohibit employees from (a) talking on the plant floor about the Union, and (b) distributing union literature an company property or from disparately enforcing solicitation rules, the Respondent has continued to violate the Act in that regard. The Respondent has committed other violations which in a like or related manner interfered with the employees' Section 7 rights. In view of Respondent's breach of the settlement agreement, it was properly vacated.

CONCLUSIONS OF LAW

1. The Respondent, Automotive Plastic Technologies, Inc., d/b/a Nashville Plastic Products, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Aluminum, Brick and Glass Workers International Union, AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to discipline employees if they talk about the Union and by prohibiting union talk on the plant floor where talk about other subjects is tolerated, the Respondent violated Section 8(a)(1) of the Act.

4. By requesting employees to report to management employees who in advocating the Union ''harass'' employees, the Respondent violated Section 8(a)(1) of the Act.

5. By prohibiting union solicitation or the distribution of union literature on company property during nonworktime in nonwork areas, and by confiscating union literature, the Respondent violated Section 8(a)(1) of the Act.

6. By engaging in the surveillance of union activities of the employees, the Respondent violated Section 8(a)(1) of the Act.

7. By coercively interrogating employees about their union activities, the Respondent violated Section 8(a)(1) of the Act.

8. By threatening employees with discharge because of their union activities; by threatening that wages or benefits would be frozen or that it would bargain from scratch if the employees selected the Union, the Respondent violated Section 8(a)(1) of the Act.

9. The settlement agreement was properly set aside after the Respondent engaged in the same violations of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Automotive Plastic Technologies, Inc. d/b/a Nashville Plastic Products, Nashville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discipline employees if they talk about the Union and prohibiting union talk on the plant floor where talk about other subjects is permitted.

(b) Requesting employees to report to management employees who in advocating the Union ''harass'' employees.

(c) Prohibiting union solicitation or the distribution of union literature on company property during nonworktime in nonwork areas and confiscating union literature.

(d) Engaging in surveillance of employees' union activities.

(e) Coercively interrogating employees about their union activities.

(f) Threatening employees with discharge because of their union activities and threatening that wages or benefits would be frozen or that bargaining would start from scratch or zero if the employees selected the Union.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Nashville, Tennessee facility copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to discipline employees if they talk about the Union or prohibit union talk on the plant floor where talk about other subjects is permitted.

WE WILL NOT request employees to report to management employees who in advocating the Union ''harass'' employees.

WE WILL NOT prohibit union solicitation or the distribution of union literature on company property during nonworktime in nonwork areas or confiscate union literature.

WE WILL NOT engage in surveillance of employees' union activity.

WE WILL NOT coercively interrogate employees about their union activities.

WE WILL NOT threaten employees with discharge because of their union activities or threaten that wages or benefits would be frozen or that bargaining would start from scratch or zero if employees selected the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

AUTOMOTIVE PLASTIC TECHNOLOGIES, INC.
D/B/A NASHVILLE PLASTIC PRODUCTS

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''